Office-Supreme Court, U.S.
FILED
DEC 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-941

In the Supreme Court of the United States

October Term, 1982

PARSONS & WHITTEMORE ALABAMA MACHINERY AND SERVICE CORPORATION and PARSONS & WHITTEMORE, INC.,
Petitioners,

vs.

YEARGIN CONSTRUCTION COMPANY,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

GRIFFIN B. BELL
FRANK C. JONES
(Counsel of Record)
KING & SPALDING
2500 Trust Company Tower
Atlanta, Georgia 30303

JAMES E. CLARK
THOMAS R. ELLIOTT, JR.
LONDON, YANCEY, CLARK & ALLEN
2100 First National Southern
Natural Building
Birmingham, Alabama 35203
Attorneys for Petitioners

Of Counsel:
ROBERT BRAUNSCHWEIG
WACHTELL, MANHEIM & GROUF
30 Rockefeller Plaza
New York, New York 10020

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

SUPPLEMENTAL APPENDIX—

Statement of Related Companies Pursuant to Rule 28.1 ..... A29

Order of the United States Court of Appeals for the Eleventh Circuit Denying the Petition for Rehearing A30

Judgment of the United States Court of Appeals for the Eleventh Circuit Affirming the Decision of the District Court A32

Findings of Fact and Conclusions of Law of the United States District Court for the Northern District of Alabama A34

CERTIFICATE OF SERVICE A67

STATEMENT OF RELATED COMPANIES PURSUANT TO RULE 28.1

Parsons & Whittemore Enterprises Corp. is the parent corporation of Parsons & Whittemore, Inc., one of the Petitioners in this action. The other Petitioner, Parsons & Whittemore Limited; Parsons & Whittemore Lyddon Ltd.; is a wholly-owned subsidiary of Parsons & Whittemore, Inc.

Subsidiaries of Parsons & Whittemore, Inc. which are not wholly-owned are The Black Clawson Company; Parsons & Whittemore (France) S.A.[1] and Parsons & Whittemore Bruxelles, S.A.

The affiliates of Parsons & Whittemore, Inc. are Parsons & Whittemore Construction Company, Inc.; Parsons & Whittemore Limited; Parsons & Whittemore Lyddon Ltd.; Parsons & Whittemore Maquinas Industrials, S.A.; The Downingtown Manufacturing Company; Flat Rock House Corp.; Hehner & Cox Limited; Lyddon et Cie; Lyddon & Company (Pulp) Ltd.; Lyddons Pulp Limited; Pulp and Paper Research Company Ltd.; Gateway Development Corp.; The Saudi Arabia Concrete Products Limited; and Gulfstream Chemicals, Inc.

---

1. Subsidiaries of Parsons & Whittemore (France) S.A. are Papeteries de Madagascar, S.A., and Societe Immobiliere Mermoz Ponthieu SARL.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING THE PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-7909

PARSONS & WHITTEMORE ALABAMA MACHINERY AND SERVICES CORP. and PARSONS & WHITTEMORE, INC.,
Plaintiffs-Appellants,

versus

YEARGIN CONSTRUCTION CO., INC.,
Defendant-Appellee.

YEARGIN CONSTRUCTION CO., INC.,
Plaintiff-Appellee,

versus

PARSONS & WHITTEMORE ALABAMA MACHINERY AND SERVICES CORP., and PARSONS & WHITTEMORE, INC.,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

ON PETITION FOR REHEARING

(October 21, 1982)

Before TUTTLE, HENDERSON and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Thomas A. Clark

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AFFIRMING THE DECISION OF THE DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-7909

D.C. Docket No. CV-79-P-1322-S & CV-79-P-1447-S

PARSONS & WHITTEMORE ALABAMA MACHINERY AND SERVICES CORP. and PARSONS & WHITTEMORE, INC.,
Plaintiffs-Appellants,

versus

YEARGIN CONSTRUCTION COMPANY, INC.,
Defendant-Appellee.

YEARGIN CONSTRUCTION COMPANY, INC.,
Plaintiff-Appellee,

versus

PARSONS & WHITTEMORE ALABAMA MACHINERY AND SERVICES CORP., and PARSONS & WHITTEMORE, INC.,
Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

Before TUTTLE, HENDERSON and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that appellants pay to appellee, the costs on appeal to be taxed by the Clerk of this Court.

August 5, 1982

ISSUED AS MANDATE:

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

CIVIL ACTION NO. 79-P-1322-S

PARSONS AND WHITTEMORE ALABAMA MACHINERY AND SERVICES CORPORATION, and PARSONS AND WHITTEMORE, INC.,
Plaintiffs,

vs.

YEARGIN CONSTRUCTION COMPANY, INC.,
Defendant.

CAPTION

THE ABOVE-ENTITLED CAUSE came on to be heard before the Honorable Sam C. Pointer, Jr., United States District Judge, in Courtroom Number 2 of the United States District Courthouse, Birmingham, Alabama, on the 22nd day of August, 1980, commencing at 9:00 A.M., at which time the following proceedings, among others, were had and done:

FINDINGS OF FACT - CONCLUSIONS OF LAW

THE COURT: The Court will now enter findings of fact and conclusions of law, dictating the same into the

record, and reserving merely the right to make corrections as to grammar to these findings and conclusions in the event of appeal.

These findings are based upon the evidence that has been presented in this cause, consisting of the testimony of various witnesses, depositions filed with the Court, and a number of documents, the most substantial of which in terms of the volume is a transcript of the arbitration proceedings themselves held over a nine day period in 1979.

The Court has considered the evidence presented, including these various documents, has read the same, consisting of something in excess, I think, of thirty-three hundred pages, in addition to, of course, considering the testimony given in open court.

The issues are as drawn by the pleadings in this case, as supplemented and refined by certain orders that occurred prior to this trial, and indeed by certain comments or statements during the course of trial, describing the issue for decision.

I have also read and studied the briefs of both sides, directing my attention to authorities of law pertinent to this litigation.

It is first appropriate that I describe in brief fashion some of the background for this present litigation.

In December, 1976, a contract was entered into between Yeargin Construction Company and Parsons and Whittemore. Parsons and Whittemore was the owner, and to be general contractor for a construction project of approximately two and one-quarter hundred million dollars —I'm using the figures relating to the construction itself, exclusive of financing costs—of a pulp mill in South Alabama.

The contract referred to provided that mechanical installation work for the project would be performed by Yeargin.

Yeargin began construction, or performance under this subcontract in the following year, 1977, there being some dispute between the parties as to whether the commencement date should be taken as the spring of that year or the fall of that year.

After Yeargin had performed something in the range of eighty to eighty-five percent of the mechanical installation work, they were, on October 6th, 1978, dismissed from the job site by Parsons and Whittemore, which at times I may refer to as P and W.

On October 20th, 1978, Yeargin filed an action in the Federal District Court in Montgomery seeking, among other things, damages premised upon several theories, and a return of equipment that remained on the job site.

By hearings conducted in that Court certain resolution of immediate problems was achieved, apparently by agreement, and indeed both parties were of an accord to the effect that at least certain issues between the parties were due to be arbitrated.

Whether that arbitration was to be conducted under commercial rules or construction rules was perhaps in dispute.

But, in any event, there was an agreement reached concerning the arbitrability of at least certain of the claims between the parties.

Questions arose in the handling of that litigation whether it should be stayed fully pending arbitration, and as to whether discovery should be stayed or not, pending arbitration.

There were appellate proceedings directed to the Fifth Circuit relating to the trial court's rulings in those matters.

In any event, in May, 1979, three arbitrators were selected by the parties. Following certain prehearing conferences, which will be covered in greater detail later in these findings, an actual hearing of the arbitration began in Birmingham on September 24th, 1979.

Hearings were conducted for the five days of that week, and for the four days of the following week, at which time, on October 4th, 1979, evidence in the case was technically concluded.

I say technically concluded because it is not altogether clear whether some matters might be subject to supplementation in briefs, and indeed it appears that there was some supplementation at least in one regard by P and W in its post hearing brief.

Oral argument was heard by the arbitration panel in November, in conjunction with post hearing briefs that had been filed, and a decision was rendered by the arbitration panel on November 20th, 1979.

In dispute between the parties as it was ultimately presented to the arbitrators was some fourteen million dollars.

Yeargin, in essence, claimed some eight million dollars in which it was asserting primarily that there were changes in the scope of work from that which it was obligated to perform, and upon which it had bid, and that which it was ultimately called upon to perform, and that there were extra charges, or breaches of contract which caused it damage in the way of extra overtime expenses, extra charges from inefficiency of coordination and the like.

P and W in addition to denying generally those charges asserted that it had just cause to remove Yeargin from the job in October, 1979, by reason of Yeargin's falling behind in work under the contract, and at least partly due to the claim that Yeargin's performance under the contract was inadequate.

It sought primarily damages in the form of the additional costs required to complete the mechanical installation portion of the project.

The award of the arbitrators went in favor of Yeargin, awarding Yeargin five million three hundred thousand dollars, plus interest, as I recall, and outlining in summary fashion the ultimate factual conclusions made by the panel.

Immediately upon receiving that award P and W instituted an action in this Court seeking to set the same aside, and alleging as grounds therefor many of the grounds outlined in Title 10 of the United States Code with respect to such awards.

Yeargin countered in that litigation by various motions, including ultimately a request in that case that the award be confirmed.

At the same time, the cause in the Middle District Court of Alabama was transferred to this Court by virtue of forum requirements under the Arbitration Law, there being a motion in that case by Yeargin to confirm the award.

The two cases ultimately found their way to me for hearing. I consolidated the two, and certain pretrial proceedings were held in the consolidated cases.

Discovery limited however in scope was permitted to P and W from the three arbitrators, as well as from a representative of the American Arbitration Association.

Other discovery was also conducted by the parties in this post arbitration Federal Court proceeding.

The matter then came on for trial last Friday, and after testimony and presentation of evidence on that Friday, yesterday and today, the cause has been submitted to the Court for a decision.

One of the grounds specified by P and W as the basis for setting aside the arbitration award relates to the situation of Barry Morton, one of the three arbitrators. Namely, it is asserted that Morton was an acquaintance of James Waldron, one of the principal witnesses on behalf of Yeargin in the arbitration proceeding, and that Morton failed to disclose that fact to the parties at any time prior to the award, and that indeed implicitly it, P and W, was unaware of that relationship.

I don't think there is any direct evidence actually that P and W was unaware of that relationship.

I, however, take that to be implicit in the case.

Additionally, evidence has been presented that Morton's firm, Robbins Engineering Company, in the fall of 1979 had a relationship with Yeargin in that Yeargin became a subcontractor on a job in North Carolina, on which Robbins was general contractor, and that this, too, was not disclosed to the parties, and implicitly that P and W had no knowledge of that fact.

It is, of course, a principle of law reasonably well established over time, and certainly established in importance by reason of the Supreme Court Decision in *Commonwealth Coatings* that relationships between an arbitrator and those involved in the arbitration may constitute a basis for setting aside the award by the arbitration panel, where those facts are not disclosed in such a manner

as to afford the parties an opportunity to at least consider whether they object to participation by that arbitrator.

In this regard, it may be noted that the same Mr. Morton did disclose in early June, 1979, that he had been a fraternity brother of the lead counsel for P and W, and that although warned or advised of this situation, Yeargin did not choose to press any claim of disqualification on the part of Morton.

Certainly the theme and expectation is that there shall be and should be disclosure by arbitrators of their relationships with the parties, counsel, and witnesses, so as to provide an opportunity by the parties to the arbitration to object, if that be their desire, to further participation.

The association between Morton and Waldron is, as shown by the evidence to be this, that some ten to fifteen years ago Morton attended a seminar at which Waldron was the instructor. This fact, or, at least, some acquaintanceship was disclosed by Morton to a fellow arbitrator, Mr. Poppleton, at some time during the summer of 1979, although not, as noted, disclosed to the parties to the arbitration. It should have been.

The question in part, then, becomes what is the consequence of that failure.

The rules governing commercial disputes in Triple A arbitrations have been introduced, as have been materials concerning ethical precepts for arbitrators in such disputes.

It seems clear to the Court that Morton should have disclosed the relationship or acquaintance with Waldron as soon as he learned that Waldron was likely to be a witness in the case.

It does appear that at the time of accepting appointment as an arbitrator Morton was not aware of Waldron's existence, and that this matter came to his knowledge later, while he was in the course of serving as an arbitrator.

However, as the ethical code indicates, there is a continuing responsibility on the part of arbitrators when such matters arise during the course of arbitration to make such matters known to the parties.

A second degree of relationship between Morton and Waldron is this: Some four years prior to the arbitration Morton had been instrumental in having a seminar specially arranged for employees of his company, with Waldron to be instructor, and at which Waldron did serve as instructor.

This fact, along with the earlier acquaintanceship with Waldron, was not disclosed to the parties.

Here again, this is a matter which should have been disclosed by Morton to the parties when it became known that Waldron would or might be a witness in the cause.

I do not find, however, that the failure to make this disclosure with respect to Waldron, and his prior relationship or acquaintanceship with Waldron, is such as to vitiate the arbitration award.

Even under the opinion written as the Court's opinion in *Commonwealth Coating,* without even considering the concurring opinion, it appears and is so found by this Court that the matter relating to that prior relationship is not of such a nature in its substance and effect as to invalidate the award, or, to do more than at least in this respect point out that it was an omission of something which Morton should have done.

Not every failure to disclose some matter of information is, as I read *Commonwealth Coating*, and the cases which have followed it, such as to make invalid an arbitration award.

Certainly there is somewhat less of a responsibility in that regard as it relates to a witness on the one hand than to a party on the other.

It may be recalled that it was essentially a relationship between an arbitrator and a party that was involved in the *Commonwealth Coating* case, although certainly the principles do apply not only to parties and their counsel, but, also to witnesses, as the ethical code so indicates.

The arrangement between Yeargin and Robbins in November, 1979, deserves certainly attention by this Court.

In November, 1979, Robbins was general contractor for a construction project. One of its subcontractors had certain work as to which scheduling problems existed.

During November, 1979, that subcontractor, without so far as appears from the evidence any input from Robbins, made arrangements with Yeargin to be its sub.

Under the evidence, Robbins had no right to consider and reject the sub of that sub.

The disclosure, however, of that relationship was made known by the intermediate subcontractor to Robbins in mid-November, and it is clear that at some point in November Morton became aware of that relationship with Yeargin.

It is not clear whether he became aware before or after the award rendered, November 20th, 1979.

It is clear, moreover, that in December of that year Morton became active in the Rocky Mountain Hospital

job, in a greater degree, and certainly would have had relationship with Yeargin after that point in time.

This is a close question as to whether the relationship between one of the arbitrator's companies, and a party to the litigation, which arose prior to the award, albeit after close of the hearing, and which may well have been known by this arbitrator prior to the award, is or is not a basis for setting the award aside.

I have concluded and do hereby conclude that that relationship is not such as invalidates the award.

It was according to the evidence a relatively small amount involved in that other matter. It did come at the very tail end of this arbitration proceeding.

It is not a situation where there were regular and recurring business arrangements between an arbitrator's company and a party to the arbitration, such as was involved in the *Commonwealth Coatings* case.

I do find, however, or note that it is a close question. And I simply state that my view is, on balance, taking into account *Commonwealth Coatings,* and the progeny subsequent to that decision, that it is insufficient to call for an invalidation of the award.

The principal attack by P and W upon the award involves a consideration of when and how the arbitration was conducted.

It is appropriate that I now go into some detail concerning the prehearing arrangements for that arbitration, and some details concerning the arbitration itself.

On June 13, 1979, the first pretrial or prehearing conference was held before the panel of arbitrators, who had been selected the preceding month.

The parties appeared by counsel. Discussion was had concerning the status of the case, discovery involved, the issues, and certain rules were established for the continued governance of the arbitration proceeding.

It may be noted that prior to that time discovery had been proceeding under the aegis of the Federal Court case in the Middle District, although that discovery was pursued without any waiver of the right to insist on handling an arbitration on the part of P and W, who was insisting in essence that the Federal District Court ought to get out of the matter, and leave the matter for arbitration, Yeargin taking a somewhat different viewpoint in connection, as I understand it, with certain of the alternative arguments and claims made by it.

The arrangements made on June 13th were outlined in general in a letter by Poppleton, one of the arbitrators, and indeed the arbitrator who acted as principal arbitrator insofar as conduct and management of the hearings and conferences were concerned.

Poppleton's letter of June 18th outlined in various numbered paragraphs certain matters that were to govern further proceedings. One of those paragraphs, and indeed one which becomes critical in this case, related to the setting of a hearing date. September 24th was stated in that letter as being a date scheduled for the hearing of the arbitration.

As it turns out there was later controversy as to whether that hearing date was intended to be firm and fixed, or, on the other hand, was a target date.

The arbitrator indicated later that it was a target date, and that the use of the word "scheduled" for a certain date was intended to imply the somewhat tentative nature of that, with the idea that only by having a target date could

some conflicts or potential conflicts perhaps be avoided, and in order to establish deadlines for the completion of certain discovery and preparation.

It appears that both parties were, given the nature of the other matters discussed on June 13th and their understanding of those matters, reasonably satisfied with the September 24th hearing date, the point of doubt with respect to that date being essentially a question of potential conflict with other litigation, Federal or State Court litigation.

In July, 1979, discovery which had been commenced with some energy back in February of that year continued apace. During the month of July, or perhaps July and August, P and W took eleven depositions of potential Yeargin witnesses. That being added to the ten depositions they had taken of Yeargin witnesses back in February resulted in ultimately P and W's having deposed twenty-one persons, and indeed all but two of the persons whom Yeargin ultimately utilized as witnesses during the arbitration proceeding.

Also during July interrogatories were submitted by P and W to Yeargin, seeking among other things discovery of information under the equivalent of Rule 26, respecting expert witnesses' reports.

During July it also occurred that certain depositions were scheduled at a time when Mr. Elliott, chief trial counsel for P and W, was at Air Force Reserve Camp, a matter which precipitated an objection by P and W, and a ruling by Poppleton on behalf of the arbitration panel that the depositions nevertheless proceed with another member of Elliott's firm being involved, and under a condition that persons so deposed could be redeposed, if desired, by Elliott after reviewing the content of those depositions.

On June 13 it had been specified that each side would submit to the panel and to each other by August 17th a detailed brief or synopsis of its affirmative claim being made as against the other.

At the July 23rd conference held before Arbitrator Poppleton, in which various matters concerning the case and processing of discovery were discussed, an extension of that date was granted, primarily at the request of P and W. The date specified was then rescheduled for August 24th, 1979.

It is appropriate at this point to note that during the July 23rd conference, and indeed at subsequent conferences, Elliott on behalf of P and W took the position that any directives by the panel for the expediting of the hearing must be subject to certain limitations that would enable it, P and W, to present evidence in a manner that it believed most effectively presented its side of the dispute, and that accordingly, while it would endeavor, as had been specified in Poppleton's June 18 letter, to present where feasible testimony in a written form, it nevertheless considered its right to present live testimony as critical to a fair presentation of its version of the critical facts.

This concern was a part of the reason why the submission of the brief or synopsis was rescheduled from August 17th to August 24th. Although not directly in point, it was a part of the same problem, namely P and W's concern that the schedule that had been established should be viewed with consideration towards P and W's difficulties in collecting and presenting its evidence in the case, and indeed its claims in the case.

During the July 23rd hearing the interrogatories that had previously been propounded by P and W were considered by Poppleton on behalf of the panel. Objections

had been made at that point to those interrogatories by Yeargin, taking the position that it would present the expert opinions as a part of the brief and synopsis required to be filed initially by August 17th, as extended to August 24th, and that it should not be required to do so through the form of interrogatories.

Had the interrogatories been answered in that form, the report of the experts sought by that deposition would have occurred, apparently about the 8th or 9th of August, rather than, as it turned out, August 24th.

Yeargin did submit on August 24th a detailed statement of its position. As Elliott had anticipated, it was in some great detail, presenting, as was subsequently described, an impressive set of papers to be filed, whereas the report or claim or brief submitted on behalf of P and W was of a much more limited and summary nature, more comparable to a pleading than to a detailed synopsis of the claim.

Indeed, as it turned out, the panel by later ruling indicated that P and W's submission on August 24th was deemed by it to be inadequate compliance with what had been required in the June 13th conference.

On August 30th, 1979, a prehearing conference was held, with the parties being represented by counsel, and with all three arbitrators being present. This conference was held pursuant to the schedule that had been established back in June, one of the paragraphs of the June 18th letter being the scheduling of this August 30th prehearing conference.

At this conference the parties were requested to and did present an outline of the persons whom they expected to call during the arbitration proceedings, and some brief

outline or description about the general subject area of those persons' testimony.

Consideration was also given as to expected cross-examination periods for those witnesses.

After hearing these presentations on the morning of August 30th, and after having recessed for lunch, the arbitrators returned to announce certain rulings with respect to the hearing.

It may be noted at this point that during this presentation Mr. Elliott indicated there was a potential conflict that he had with respect to a hearing set on September 24th before the Fifth Circuit, two Federal District Court cases scheduled for that week of September 24th and potential State Court litigation the following week.

When the panel returned after lunch to announce its rulings on matters that had been presented to it, it stated that the hearing would be held as previously scheduled, on September 24th, 1979.

It indicated that there would be time limitations placed on the parties so as to enable the arbitration to be conducted within a two week period of time.

Yeargin was allowed or allotted for the presentation of its witnesses, including cross-examination, the first three hearing days.

P and W was then given five days, and then a day was assigned to each for rebuttal.

Recognizing that the parties in their outlines on the morning of August 30th had indicated hearing times substantially in excess of a two week period of time, the panel in effect reiterated what had earlier been said on June 13th, this time placing greater teeth in that admonition.

On June 13th the panel had admonished the parties that, where possible, evidence should be presented on direct by written affidavits, or depositions, or the like, and that live testimony was not generally encouraged, at least not cumulative live testimony.

In the August 30th afternoon hearing the panel in effect said that, if you comply with these directives, you can, we think, present your case satisfactorily within this ten hearing day schedule.

Mr. Elliott on behalf of P and W objected strenuously to both types of rulings, that is, both the failure to grant a continuance, as well as the question as to the satisfactory nature of the claim which he had presented, and, more particularly, to the restrictions on the length of time being allotted to the presentation of his witnesses.

On September 10th, 1979, P and W filed with the Arbitration Association various documents. In summary, the documents requested, first, that its earlier claim be treated as satisfactory for submission; that there be a postponement of the September 24th arbitration hearing date, and thirdly, that the arbitrators be disqualified, or recuse themselves, or be removed—depending upon one's terminology—by reason of alleged bias or favoritism shown during the course of the prehearing matters.

This set of motions was initially referred to the Offices of the American Arbitration Association in New York, but ultimately returned for decision by the arbitration panel.

And on September 17th there was a presentation to the panel of these motions, the parties appearing by way of telephone conference.

The arbitrators ruled at that time, actually by telephone, or telegram, shortly after the conclusion of the

telephone conference that they would not continue the hearing date—that it would be on September 24th.

They made some modification, perhaps it may be called, with respect to the adequacy of the statement of claim filed by P and W, and they denied the request that they be removed, or excused, or disqualified from the hearing.

The proceeding then was begun on the morning of September 24th. Elliott was not there representing P and W. He was rather in Montgomery appearing before the Fifth Circuit in connection with the appellate argument.

P and W was represented on that morning by an associate of Mr. Elliott's law firm, one who had been involved in this arbitration and its preparation, although that associate was a recent graduate from law school, without any extensive experience prior to this matter.

P and W was represented secondly by an attorney from New York who had been representing P and W throughout these proceedings, and who had been shown as counsel along with Mr. Elliott's firm for P and W in the arbitration proceeding, but who also had not been involved in the detailed preparation of the case for arbitration hearing.

Thirdly, P and W was represented by an attorney from another law firm in Birmingham, who has been specially brought into this case in view of Mr. Elliott's expected absence, at least for the morning of September 24th, and in view of the difficulties of readying the case for hearing.

This third attorney was originally contacted on August 30th after the panel decision previously described, had said that he could undertake representation as of August 31st provided, however, Mr. Elliott remain in the case,

and primarily in charge of P and W's interest, and was in fact not brought into active work on the case until September 17th, the time of the telephone conference rulings denying the motion for continuance.

The panel refused on the morning of September 24th to continue the hearing generally, or to continue the hearing until Mr. Elliott could arrive.

The panel did, however, agree that cross-examination of witnesses presented during Mr. Elliott's absence could be conducted after Mr. Elliott returned.

There was daily transcript being taken in this arbitration proceeding, and under the evidence it appears that transcripts of morning sessions were available in the early afternoon of each day and that transcripts of afternoon sessions were available apparently sometime either that night or early the next morning, that matter not being clear from the record.

Mr. Elliott arrived at about 2:30 on Monday, the 24th. At that time Yeargin had presented, I believe it was, three of its witnesses. I may be mistaken as to whether it was three or four. One of those was cross-examined by Mr. Elliott somewhat after his return.

I believe I'm correct that actually there was some additional cross-examination by Mr. Elliott of that very same witness the following morning, because the cross-examination was not completed the afternoon of the 24th, and cross-examination was afforded to Mr. Elliott on the 25th of the other two witnesses who had testified during his absence.

With a minor exception, which need not really be addressed, the other three attorneys for P and W then remained in attendance during the balance of the arbitration proceeding, which as previously indicated was con-

cluded actually early on the morning of Thursday, October 4th. In fact, the parties, utilizing the procedures that had been adopted by the arbitrators, and under the urging and pressure of the arbitrators periodically expressed to move forward expeditiously and not to repeat matters, completed the presentation of evidence in less time than had been allotted by the arbitrators.

This was true both for Yeargin and for P and W.

The basic position of P and W is that from a statutory basis there was a failure of the arbitration panel to grant a continuance when just cause therefor was shown, and from a statutory basis there was a failure to receive evidence as required by the statute, in view of a combination of matters, namely, the procedure adopted by the arbitration panel for the hearing of evidence primarily in a written form, the refusal of the arbitration panel to continue the case from September 24th to a later date, and the limitation by the panel of this ten day hearing period, all of which factors combined, as P and W here presents, to effectively preclude the reception of relevant and material evidence.

P and W also asserts that in effect there was a failure of fundamental fairness in the procedures and in the rulings of the arbitrators, and particularly in its ability, or, rather, inability to effectively counter under the panel's rulings the evidence presented through what has become to be known here as the Sirrine Report and the Waldron Report.

I'm not sure quite where to begin in the sequence or listing of matters claimed to invalidate and impair these proceedings.

Insofar as the failure of the panel to grant a continuance from September 24th until perhaps September 25th, for example, that is, during the period of Mr. Elliott's

absence from the hearing, the Court finds that is not a basis for invalidating the procedure, or the award. Other counsel, varied in abilities and experience and in knowledge of the case and yet in combination certainly competent to represent P and W on that occasion, were present. The procedure adopted involving the cross-examination by Mr. Elliott after his return, in the light of the availability of the daily transcript and of recollections by his co-counsel of the matters that may not necessarily appear in the printed record, were adequate to allow adequate representation of P and W in that manner.

I have carefully reviewed the cross-examination and the direct examination of those witnesses. I am persuaded that there was adequate and effective cross-examination of those witnesses on the part of Mr. Elliott, and on behalf of P and W.

It seems to me that the most that can be said there is that what really happened was that it put extra stress on counsel, and that I do not see any indication of any ineffectiveness in the representation of P and W's interest from that. I do recognize and understand the additional stress it would have placed on counsel both at that time, and in terms of attempting to get back momentum for the balance of the case.

I do not quite understand the position of the arbitrators in not allowing at least a half day's delay in the proceedings. At the same time, I cannot say that it was a mistake or a matter that invalidates the proceedings.

The major concern throughout this case relates to the difficulties faced at the arbitration hearing by P and W in responding to the impact of the Sirrine and Waldron reports.

Sirrine Report and the Waldron Report were certainly of major significance in this arbitration and indeed must be seen, at least the Sirrine Report, as in all likelihood a major basis for the panel's award.

The Sirrine Report was one which essentially evaluated the scope of contract change between May, 1975 flow sheets, and the work as built.

Whether the methodology of that report was correct, or, on the other hand, was valueless, is, of course, a matter that this Court need not determine.

The Sirrine Report attempted to quantify the changes found to the extent they were deemed to be changes in scope, in terms of man hours to which then dollar rates to be applied as appropriate under the circumstances.

The evidence in this case presented before me in these combined cases is to the effect that to have reviewed the Sirrine report and prepared a detailed critique and evaluation of that report, being able to outline not only problems involving methodology or assumptions or logic or perhaps even isolated errors, but to go beyond that and to in effect give a total review and comparable study by other consulting firm, would have taken time estimated at from three months and up. The particular experts have disagreed only slightly in their estimates as to the length of time.

Yeargin has put on an expert indicating that a somewhat different type of critique could be accomplished in less time, such as fifteen working days. That report, as I view it, is not quite the same kind of report as what was being addressed by the experts presented by P and W.

The basic position by P and W is that despite earlier requests for the Sirrine Report, including interrogatories filed in July, it did not receive the Sirrine Report until

August 24th, just thirty days prior to the commencement of arbitration proceeding, and only forty days prior to the actual last day permitted for the arbitration proceeding.

This was, it says, an inadequate time which should have justified when that matter was called to the attention of the arbitration panel a continuance; that the failure to grant that continuance resulted in the panel's not receiving evidence, contrary to the statute, because of its, P and W's, inability to provide that evidence; and that indeed, in terms of fundamental fairness, considering the important nature of the Sirrine Report, the arbitration proceedings cannot be considered as valid and binding.

Yeargin counters by saying that the nature of the dispute concerning the scope of work, and its financial impact, was an important issue throughout the entire proceedings; that P and W could have, as it did, undertake in such a study back in February or March of 1979; and that if it had, by the testimony of P and W's own experts, those firms could have themselves made such a study.

Yeargin in effect discounts the need as here asserted by P and W for those opinions by consulting firms to directly address the Sirrine Report, asserting that the period required for comparing two studies is not the only way by which the evidence from one side can be countered by the other.

The Court has been told that consultation was undertaken by counsel for P and W relatively early, at least back in March, I believe it was, of 1979, concerning the undertaking of such studies in the effort to be prepared for the Sirrine Report or something of that order; that a decision was made based in large part upon the recommendation of those consultants not to undertake a study until Yeargin's study, that is, that of Sirrine was available

for comparison and critique; and that in essence it decided to follow the advice of the outside consultants, while at the same time attempting to expedite when it would receive the Sirrine report.

It does not appear, the Court would have to say that there was total communication between counsel for P and W and the experts who were consulted by them in terms either of the length of time that such a study would take by the consulting experts, following receipt of a study such as the Sirrine Report or, on the other hand, when the scheduled hearing date was. It is not clear, at least from the evidence, whether that information was sufficiently shared between the two, so that there was an awareness that an adequate rebuttal as they viewed it to the Sirrine Report could not be accomplished within the time frame that was scheduled by the panel on June 13th.

Up until August 30th the only opposition by P and W to the proposed scheduled hearing on September 24th was in terms of potential conflicts with other cases and litigation. Up until August 30th, 1979, there was no presentation by P and W of inability to prepare and to present its case at an arbitration proceeding that would commence September 24th, and this is so even though the Sirrine Report was not received until August 24th, and indeed P and W's counsel was on notice that it would not in all likelihood be received until August 24th, that knowledge having occurred really as a result of the July 23rd conference in which there was a setting off of the submission date and a denial of the request for interrogatory information.

In fairness, however, it must be said that so long as Mr. Elliott was not of a belief that in fact the arbitration proceedings would be conducted and concluded within any such period of time as two weeks, for example, one might

reasonably have expected, if the arbitration proceedings themselves were to last over a several month period of time, that there would perhaps be enough time from the receipt on August 24th of the Sirrine Report until the time there would be a need to present rebuttal testimony during an arbitration proceeding.

The Court certainly can understand that up until the decision of the panel on August 30th, both fixing the date of September 24th as certain and at the same time restricting the length of the hearing, that it was not at that point necessarily any dereliction of duty not to have called to the attention of the arbitration panel the potential inability to have the kind of reports which P and W wished to present.

It is perhaps appropriate in this conjunction, without yet making certain more ultimate findings in this matter, to consider the companion or related question; namely, the procedures adopted by the panel for hearing this arbitration, that is, the preference and pressure by the arbitration panel upon the parties to present their direct evidence in a written summation form, whether by affidavit, or deposition, leaving for live examination essentially the cross-examination, with certain conditions and specifications.

Much is said here by P and W in opposition to that practice. However, I believe that practice to be allowable as a practice of an arbitration panel. It is not, as I view it, a denial of any fundamental process or rights of process of fair hearing to have such a mode of presentation of evidence, particularly where, as here, the panel provided a procedure for live cross-examination, generally imposing the duty upon the one who would present the written testimony to have that person available for live cross-examination.

And while I certainly understand the irritation that must have been felt periodically by counsel for both sides with some of the remarks made by Arbitrator Barge, I do not conclude that that aspect of the hearing, that is, his pressure for continued expediting of presentation and his comments to counsel to be that which would in any way invalidate the proceedings.

The Court had to note with humor the interplay between the arbitrators, when at times one arbitrator would object to another's questions as either being repetitive or unclear or the like; and the Court has to note that, while perhaps the majority of Mr. Barge's caustic comments were directed at Mr. Elliott, it's not clear that this is so. I didn't count them, but there was a sufficient number directed at various parties that I do not see in that the kind of question of partiality that might somehow invalidate the proceeding. One of the questions that has been argued and presented here is that, although the five days and the one day allotted to P and W were not totally utilized—indeed there was about a three or four hour period on a Friday that in effect was assigned apparently as additional time to P and W, which went unused—that, nevertheless, the combination had the effect of prohibiting or not allowing P and W to present all of the witnesses that it would have liked to have presented.

Yeargin argues that in effect this position can't be adopted, because P and W didn't utilize its full time. I would reject that type of argument by Yeargin, Counsel for P and W were under the constraint to present all of their essential evidence dealing with their case in chief and in rebuttal of the claims made by Yeargin in a five day period, allowing for cross-examination. The mere fact that it took somewhat less than that five days in which to do that does not mean that they did not, or might not

have missed certain witnesses they would certainly have put on had the time not been so structured.

In this connection, it has to be noted that one cannot be that sure of how long the opposition's cross-examination is going to take, and certainly, while the litigation, or arbitration was of major importance to both companies, it didn't justify having at all times a great overflow of possible witnesses available who could not realistically be expected to testify.

At the same time, insofar as it is claimed that P and W really didn't get to use some of these other witnesses that it could have used or would like to have used, the Court has to conclude here that the method for presentation suggested by and urged by the panel would have, had P and W chosen to make more use of that procedure, enabled P and W in effect to have far more time than it did. For example, Mr. Boyhan's testimony could, much of it, have been presented by way of the affidavit process emphasized by the panel, which would have given additional time, if that was desired, for other witnesses.

P and W had its own reasons, obviously, for wanting witnesses to testify live, and I do not challenge, and I have not heard Yeargin here challenge, the wisdom of that decision. It is essentially a tactical decision, and I cannot say the decision was not the best decision to have made. But, simply in terms of the question of arguing about not having enough time, the Court has to conclude that there was enough time provided for P and W's witnesses, if P and W had chosen to follow more closely the method followed by Yeargin, and the one which the arbitrators had certainly urged and suggested.

I return to the question of the Sirrine Report, which I had left to get into this question of whether there was evidence precluded by way of the procedures adopted.

There are many ways of contradicting evidence presented by experts, no one of which certainly is appropriate in all circumstances.

The Court has no difficulty with the position of P and W, that it would have preferred to have at least had a study, one or more made, concerning the Sirrine Report, or the Waldron Report, which was in sufficient detail in effect to have been parallel to it, and showing some glaring errors in logic, or mathematics, or the like, even on the same methodology.

The time for that certainly was not available under the procedures as adopted by the panel. There was, however, time for a modified approach to that, whether in terms of some sampling of results, as well as a critique of basic methodology. And indeed, there was opportunity for the basic presentation of other expert opinions concerning the source of materials relied upon, the basic methodology and approach adopted by Sirrine or by Waldron.

Indeed, as I read through the transcript of the proceedings, there were more than one such witness presented by P and W to the panel whose testimony cast significant doubt on the validity and weight of both of those reports.

It may well have been, and one must surmise from the result of the arbitration proceeding, that such evidence did not sufficiently impress the arbtirators to the point of rejecting the Sirrine Report.

The Waldron Report, it appeared to me, was—close to the words used in the brief filed by P and W essentially destroyed by his own testimony and by other evidence in the case. It is, of course, not for this Court to decide or to redecide the merits of the controversy, nor, in this am I saying that there could not have been

prejudice to P and W in terms of the ultimate result of the arbitration proceedings by not having had the type of report it would like to have had.

It certainly would have had time, however, to have presented someone else's study in written form, such as might duly impress the two engineering types on the arbitration panel, showing in comparison with the Sirrine Report, although not patterned after it and although adopting the approach of other engineering firm, what changes in scope of work were deemed to have occurred and what the economic impact of that was, and likewise in connection with the Waldron report, the effect of scheduling problems and the like.

In this connection, it is perhaps due to be noted that, as I view it, the Waldron report had two major purposes, one of which was, to be sure, the presentation of evidence in support of certain of the claims made by Yeargin against P and W in connection with the overtime and inefficiency claims. A major purpose of that report also was in rebuttal of claims made by P and W to the effect that Yeargin was behind schedule, thereby justifying termination and thereby justifying P and W's claim in chief.

There is no requirement, as I view it, that in each arbitration proceeding there be, for fundamental fairness to be accomplished, an exchange of information of this sort. It appears to me that the panel did achieve a modicum in that area, not perhaps the type I would have provided had I been sitting on it, whether as arbitrator, or as judge in a court proceeding. That, however, is not the standard by which this matter is to be reviewed by me. I conclude that there was no violation in this regard such as would invalidate the arbitration proceeding, and arbitration award.

I am not sure that I have gone through each of the claims made by P and W. I know I have thought about each of the claims, but I may not have recited them in these findings and conclusions.

As counsel are perhaps aware, I never ask counsel at the conclusion of one of these dictations in any way to indicate an agreement with the Court, nor certainly to waive any rights they have.

My decision will be in favor of Yeargin, plaintiff in Case 79-1447, and in favor of Yeargin, the Defendant, in Case 79-1322.

The request for attorneys' fees by Yeargin in either or both cases is denied.

I do ask counsel again, without any waiver of rights to file post hearing reviews with this Court or to take appellate review, to let me know if there is some matter of fact or issue that I haven't touched upon or covered which should be, or if there was some confusion basically in what I have said, again not asking any waiver of the right to object.

MR. NACHMAN: Your Honor, as I understood the Court, there was a reference to the statute, the Arbitration Act as Title 10, I believe, and I think it's Title 9 of the United States Code.

THE COURT: Maybe it's Title 9, Section 10.

MR. NACHMAN: Section 10, yes, sir.

THE COURT: All right.

• • •

Any other questions?

There is one matter that perhaps I should have recited, and that is, Mr. Elliott had other conflicts, namely in the Federal and State Court, that were presented in connection with his request for a continuance on August 30th, 1979. The two Federal cases set the week of September 24th, 1979, were continued as a result of his or his law firm's effort in that regard. There is no indication as to what happened with respect to the State Court cases set for the week of October 1st, other than whatever happened to them did not apparently require Mr. Elliott's presence on those cases, because he was in attendance at the arbitration hearing during those times.

Were there any other matters?

I might make this comment, as to who should make the decision concerning a request for excusal, or recusal, such as was presented by P and W on September 10th, 1979. There is to some degree a conflict between the rules of the Association, Section 18, on the one hand, and the Canons, Canon 2 for Commercial Disputes, on the other. Section 18 indicates that matters going to alleged bias would be submitted to the Arbitration Association and apparently decided by it, although with a copy, in the discretion of the Arbitration Association, being directed to the panelists themselves. Canon 2 of the Canons indicates that matters going to their bias and the other matters listed, including partiality, are matters which apparently the arbitrators may decide for themselves and standards are given.

In Section 18 there is not included in the description of matters that would go to the Arbitration Association for decision alleged questions of partiality. That is contained in Canon 2, relating to what arbitrators would deal with themselves.

There is an overlap between the two sections when one talks about bias and certain other matters as it relates to alleged partiality. That is included only in the Canon 2 item for decision by the arbitrators themselves.

Considering the timing of these several motions of September 10th, 1979 and the scheduled hearing dates, September 24th, 1979, and considering that for the most part what was at the heart of the motions was a partiality claim dealing with certain rulings, I would say that they were due to be decided by the arbitrators themselves rather than by the Triple A, and that there was logic on the part of the Arbitration Association to send this type of request, under the circumstances, to the arbitrators for decision. I do recognize, however, this conflict area in the two sets of written matters, the Canons on the one hand and the Rules on the other.

I am looking through the list of issues—I certainly should have mentioned that the request for continuance of the hearing on September 24th, that request having been made on August 30th, and renewed on September 10th, were opposed in each instance by Yeargin, so, this was not a situation of the parties having jointly requested a continuance.

There was a question as to whether Poppleton was guilty of prejudicial misconduct in failing to disclose his knowledge concerning Morton's relationship with Waldron. It perhaps follows from what I have already said that that was not prejudicial misconduct, this following in part from the ruling relating to Morton himself.

There has been a complaint that the time of the hearing, that is, its date as well as its length, was arbitrarily arrived at by the arbitrators, giving, in effect, priority to their own scheduling, and not adequate consideration

of the interest of the parties, and that there was a misleading of the arbitrators at the time of the initial appointment.

There is much in what was said during some of these proceedings by Mr. Barge that is supportive of that claim, and, indeed, that is one of the major reasons why I would decline to award attorneys' fees in this case as Yeargin has requested.

The Arbitration Association should have under its rules described to the arbitrators prior to their selection and acceptance an estimate as to the length of time, or a least some greater description of the case than what was given. Apparently only to Poppleton was there given any kind of general statement about the length of the case, other than it was a bid case. The failure of the Arbitration Association to do that certainly should not be condoned. It does not, however, in and of itself invalidate any proceedings.

However, if there was an arbitrary giving of preference to their own schedules contrary to the positions of the parties, and indeed contrary to the requirements of fair process, then, that would be another matter.

In reviewing with care what was done and said by the arbitrators in prehearing conferences and during the arbitration hearing itself, while dismayed with some of the comments made from time to time, particularly by Mr. Barge, the conclusion I must reach is that the retention of the September 24th date was not an arbitrary preference to their own schedules. Both Morton and Poppleton testified, and I credit that testimony, that they could have handled the matter later during the year. Mr. Barge indicated that his schedule was crowded, and was

perhaps not nearly as clear on this point as the other two arbitrators.

Insofar as the length of time is concerned, notwithstanding their admonitions periodically expressed to counsel to move on, get going, not be repetitive, it was, in my evaluation of what happened, a pressing of the parties to be more efficient and expeditious in the presentation of evidence, and indeed, had they thought and concluded that a longer period of time was required in order for fair presentation, they would have afforded that length of time.

The problem is that they thought that the case could be fairly presented in ten days time, and, given that belief and opinion, they made every effort to get the parties to present it within that period of time. I do not believe, and I would find to the contrary, that they restricted it to ten days because that's all "they had to give to the arbitration." I think a more correct reading of it is that that is all at least Mr. Barge was willing to give to the arbitration as he understood the issues and how it could be presented within that ten day period.

That has been a major point, and I think I needed to cover that in my findings.

The Clerk will be and is directed to enter judgment in favor of Yeargin in both cases, in each case taxing costs against Parsons and Whittemore.

MR. STARNES: May it please the Court, for the purpose of the record, as I understand from what Your Honor has said, I am not called upon to say anything, comment upon it? I think obviously the Court knows that I am very disappointed in the decision without my saying so, but, that in my silence I'm not waiving any

rights that my client may have to take any future action that it may deem appropriate?

THE COURT: Certainly no waiver, and it was really just to see if there were some areas of omission or commission about findings or issues that should be covered, if for no other reason than to give you additional matters on which complaint or appeal might be taken.

All right.

END OF PROCEEDINGS.

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT upon counsel for all parties, by depositing a copy of same in the United States Mail, postage prepaid, addressed as follows:

Mr. Roland Nachman, Jr.
Suite 809
First Alabama Bank Building
Montgomery, Alabama 36101

Mr. O. G. Calhoun
Haynsworth, Perry, Bryant,
Marion & Johnstone
Suite 409, East North Street
Greenville, South Carolina 29602

This 13th day of December, 1982.

.....

FRANK C. JONES